No. 18711

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

JOHN LEE HESTER,

Appellee.

Appellant's Opening Brief and Petition for Writ of Mandamus.

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No. 18711

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN LEE HESTER,

Defendant.

Application for Leave to File a Petition for a Writ of Mandamus.

The United States of America moves in this Court for leave to file a petition, attached hereto, for a writ of mandamus. The United States further moves that in the event this Honorable Court determines that it does not have jurisdiction to hear the Government's appeal, notice of which was filed on May 15, 1963, a rule be entered and issued directing the Honorable William C. Mathes, District Court Judge, Southern District of California, to show cause why the writ of mandamus should not issue against him vacating his judgment of April 16, 1963, dismissing the indictment against John Lee Hester, and entering an order direct-

ing him to reinstate the indictment and set a date for trial.

Respectfully submitted,

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No. 18711

IN THE

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FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN LEE HESTER,

Defendant.

Appellant's Opening Brief and Petition for Writ of Mandamus.

I.

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION.

On January 29, 1963, the Federal Grand Jury for the Northern District of Florida, Tallahasse Division, returned a one-court indictment [C. T. 2][1] charging that the appellee, John Lee Hester on or about November 28, 1962 unlawfully transported in interstate commerce from Downey, California to Tallahassee, Florida, a stolen 1956 Pontiac automobile in violation of Section 2312 of Title 18, United States Code.

On February 8, 1963 the appellee filed a Motion for a Change of Venue [C. T. 3], requesting basically, that the trial be moved to Los Angeles, California since the appellee and all the witnesses resided in California.

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[1]C. T.—refers to Clerk's Transcript of Record.

On February 8, 1963 the appellee's motion, considered as a motion for transfer under the provisions of Rule 21(b), Federal Rules of Criminal Procedure, was granted and the cause transferred to the United States District Court for the Southern District of California, Central Division [C. T. 4].

The appellee was delivered by United States Marshals to Los Angeles in late March or early April 1963 [R. T. 7].[2] On April 8, 1963 the appellee's case was set for trial on April 16, 1963 before the Honorable William C. Mathes [C. T. 7].

On April 15, the appellee appeared before the Honorable William C. Mathes and petitioned the Court to withdraw the plea of not guilty previously entered and to enter a plea of guilty to the offense charged in the indictment. The plea of not guilty was withdrawn and the plea of guilty was entered [R. T. 5]. Appellee's counsel moved for immediate sentencing, which motion was granted [R. T. 6].

The Court thereafter revised its earlier position, rejected the plea of guilty, entered a plea of not guilty and ordered the case to jury trial [R. T. 15], the following morning.

On April 16, the Government filed a motion for a one-week's continuance on the basis that the presence of necessary witnesses could not be obtained on less than one day's notice. The Government's motion was denied.

Defense counsel thereupon at the direction of the Court moved for a dismissal of the indictment for

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[2]R. T.—refers to Reporter's Transcript of Proceedings.

failure of prosecution. The motion was granted and the indictment was dismissed, from which judgment the Government appeals [R. T. 19].

The jurisdiction of the United States District Court for the Southern District of California, Central Division, was based on Sections 2312 and 3231 of Title 18, United States Code.

On May 16, 1963 the appellant filed a notice of appeal [C. T. 11] from the order of the District Court dismissing the indictment.

Jurisdiction of the United States Court of Appeals for the Ninth Circuit is based upon Sections 1291 and 1294 of Title 28, United States Code and Section 3731 of Title 18, U. S. C. If this Honorable Court determines that it does not have jurisdiction of this matter under Section 3731, the United States requests in the alternative that this Court issue a writ of mandamus vacating the judgment of the Honorable William C. Mathes dated April 16 and order him to reinstate the Indictment and set a date for trial.

II.
STATUTES INVOLVED.

Sixth Amendment of the Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

18 United States Code, Section 2312 provides:

> "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Rule 48(b), Federal Rules of Criminal Procedure provides:

> "(b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

III.
QUESTION PRESENTED.

Did the District Court abuse its discretion in dismissing the indictment of January 29, 1963 for "want of prosection?"

IV.
STATEMENT OF THE CASE.

Since the sole issue before this Honorable Court is whether there was an abuse of judicial discretion in dismissing the indictment, the transcript of the proceedings in this case before the Honorable William C. Mathes composes the core of the subject matter for examination.

The appellee appeared before the Honorable William C. Mathes at 10:00 a.m. on April 15, 1963, announced, through his counsel, a desire to change his plea and offered a signed written petition to enter a plea of

guilty [R. T. 3, 4; Petition to enter plea of guilty, 27 F. R. D. 39, 50.07]. Prior notice of the desire to change plea had been given to the appellant's counsel.

The Court questioned the appellee and his counsel to determine that the plea was voluntary and made with understanding of the charge. The following colloquy occurred:

"The Court: Have you discussed it fully with your attorney, Mr. Stephen King, before you signed it?

Defendant Hester: Yes sir.

The Court: Do you feel you fully understand it?

Defendant Hester: Yes, sir.

The Court: Do you feel you fully understand the charge against you in the indictment?

Defendant Hester: Yes, sir.

The Court: Are you entirely sure you wish to confess that crime by pleading guilty to the indictment?

Defendant Hester: Yes, Sir.

The Court: Are you guilty of that crime?

Defendant Hester: Yes, sir.

The Court: In your opinion, Mr. King, is the plea of guilty which the defendant John Lee Hester now offers to the offense charged in the indictment voluntarily and understandingly offered?

Mr. King: Yes, your Honor.

The Court: And is it consistent with your advice to him?

Mr. King: It is, your Honor.

The Court: Very well. The clerk will enter a plea of guilty on behalf of the defendant John Lee Hester to the offense charged in the indictment."

After having satisfied itself as to the providency of the plea the Court granted the appellee's motion for immediate sentencing [R. T. 6].

In the statements made by both the appellee and his counsel certain matters were offered to the Court in mitigation of punishment for the appellee's violation of the "Dyer Act." The Court was requested to grant the appellee probation for this offense which carries a five year maximum sentence because he had already spent several months in jail, because he had a reasonably clean record, because he had a "good job waiting for him" and because he had not intended to permanently deprive the owner of his car [R. T. 7-9].

Government counsel thereupon pointed out to the Court that he had shown the entire report file to the defense counsel prior to the defendants change of plea. It was stated that this file disclosed that the appellee was given the car in the presence of several witnesses, all of whom had given the Federal Bureau of Investigation similar statements as to the circumstances in which the appellee had received the car from its owner. The appellee, according to these witnesses, had been loaned the car for the purpose of transporting himself from one point in Southern California to his home in Los Angeles.

Having been presented with the general circumstances of the charged offense the Court commented, "I was trying to learn *how he expected to get away with it.*" [R. T. 11, emphasis supplied].

The Court then proceeded to inform the appellee of a recent Dyer Act prosecution in which the jury had acquitted the defendant. In addition, the Court noted that

it was assuming that the appellee had ". . . violated the limits of the authority." Essentially, the Court attempted to indicate to the appellee the possible wisdom of changing his plea to one of not guilty. In order to give the appellee time to consider the matter the Court called a recess until the afternoon of the same day [R. T. 13-14].

When the Court was reconvened on the afternoon of April 16, 1963 the defendant was asked through his counsel as to whether or not he wished to let his plea stand. Counsel stated, "well, our position is the same as before."

At this point the Court rejected the plea of guilty, ordered the clerk to enter a plea of not guilty, and expressed the intention of hearing the case the following morning.

Government counsel then informed the Court that during the recess an attempt had been made to contact necessary witnesses because of the indications during the morning session that the guilty plea might be rejected and the case ordered to trial. As a result of this investigation, it had been determined that the car owner was driving a truck from coast to coast and could not possibly be available the following day. He stated, in addition, that another necessary witness was ill and could not appear on the following day.

The Court's reply to the statement that the Government would be unable to go to trial, was,

> "Yes, we will try the case tomorrow. I don't like to put the Government in that position. But probably that is a very just position to put the Government in."

Government counsel asked

"Put on the case without witnesses?"

The Court answered,

> "In this particular case, because of facts I shouldn't know and do know which came out on the discussion of the sentence." [R. T. 15-16].

The following day, Government Counsel presented a written Motion for a one week's continuance to the Court based on the unavailability of witnesses on such short notice [R. T. 18; C. T. 7]. In a supporting affidavit Government Counsel pointed out that after subpoenas had originally been issued, the defendant's counsel had informed the Government of the decision to enter a plea of guilty. At that time the Marshal's office had been contacted and the subpoenas recalled. The period of time between the afternoon on April 15 and the morning of April 16 had been insufficient to enable the Government to obtain the presence of witnesses. The most vital witness, the owner of the vehicle in question, could not be contacted since he was out of the state driving a truck cross country [C. T. 9].

At this point, for the first time, the appellee's counsel protested any delay in the trial. Less than twenty-four hours earlier counsel had informed the Court that the defendant's decision to plead guilty was in accord with his advice to his client. Government counsel stated that the defendant had been responsible for the substantial delay caused by transferring the case from

Florida to California, since he had moved for transfer under Rule 21.

The Court's then stated reaction was:

> "The Court: Of course, in view of what occurred yesterday, gentlemen, I know something about the Government's case here. Without reviewing all of those matters which you said yesterday, and in the light of it, I think in the interest of justice the defendant is entitled to his Sixth Amendment right to a speedy and public trial; and as he insists on the date now set—which I shall rule to be right now—I will deny the motion."

Having denied the motion for a continuance the Court stated to the defendant's counsel, "I will hear your motion." [R. T. 19]. The record gives no indication that counsel had exhibited any desire to make a motion. A motion for dismissal was then made and immediately granted. [R. T. 19].

VI.

SUMMARY OF ARGUMENT.

A. The dismissal of the complaint for stated want of the prosecution was of an arbitrary and unreasonable nature and a violation of judicial discretion.

B. This violation of discretion is of such an exceptional arbitrary and unreasonable nature that a Writ of Mandamus is an appropriate corrective measure in the event appeal of such a question is not available to the Government.

VII.

ARGUMENT.

A. This Dismissal of the Complaint for Stated Want of Prosecution Was of an Arbitrary and Unreasonable Nature and a Violation of Judicial Discretion.

Since the *stated* reason for dismissal of the indictment was for "want of prosecution" a close examination of the record is required to determine whether there was any such delay which *could be thought* to constitute a basis for, in effect, throwing the case out of court and depriving the Government of a day in court.

As previously stated, the appellee was apprehended by the Florida Highway Patrol of November 26, 1963. Some short time after that he was handed over to the federal authorities. On January 29, 1963 he was indicted for violating Section 2312 of Title 18, U. S. C. The record does not disclose any demand for earlier indictment by the appellee nor any unnecessary delay in indictment.

Very soon after the indictment, on February 8, 1963 the appellee filed a "Motion for a Change of Venue" to California. Since only slightly over a week had elapsed since the indictment, no unreasonable delay could possibly be thought to have transpired.

On February 15 the District Court interpreted the above motion as one for transfer under Rule 21(b) and granted the Motion ordering the case transferred to the District Court for the Southern District of California.

Thereafter and pursuant to that order the appellee was transported from Tallahassee to Los Angeles by

United States Marshals in the customary manner [R. T. 7].

There is every reasonable expectation that in the normal course of events the appellee would have received an earlier trial date in Florida, but for his motion for a "Change of Venue." Any delay caused by the transfer must be attributed to the appellee and not to the Government.

After the appellee arrived in Los Angeles, he was arraigned and his case set for trial with exemplary promptness. As the trial court stated: "Well, the delay hasn't been here." [R. T. 7].

It again must be stressed that the record discloses no demand for an earlier trial date by the appellee prior to the morning following the aborted sentencing. Clearly under the circumstances a continuance of one week did not violate the letter or spirit of Rule 48 of the Federal Rules of Criminal Procedure or of Article VI of the Constitution of the United States.

The record clearly shows that the appellee failed to substantiate his claim that he had been prejudiced by any delay in being brought to trial. Under these circumstances this failure of substantiation was only to be expected.

(See *United States v. Research Foundation,* 155 F. Supp. 650 (D. C. S. D. N. Y. 1957) and *United States v. Fassoulis,* 179 F. Supp. 645 (D. C. S. D. N. Y. 1959) concerning burden on defendant to assert claim to earlier trial.)

As the Court stated in *United States v. Alagia,* 17 F. R. D. 15, 16 (D. C. Del. 1955):

> "The question of when a defendant has been denied a speedy trial is necessarily a relative one, depending upon the circumstances of the particular case. The role which the defendant himself has played must be scrutinized in the same manner as the prosecution."

Scrutinization of the record in this case reveals that the defendant was responsible for substantial delay in moving for change of venue. Why this motion was put forward when the defendant decided to plead guilty after the case was transferred is a mystery for which the record provides no answer. As previously stated the Government was forced to ask for a reasonable continuance to permit the serving of subpoenas which had been previously recalled after the defendant had informed both the Court and the Government of his decision to change his plea to guilty. The recall of subpoenas under such circumstances is, of course, a customary step to save the Government needless expense.

In setting out the broad outlines as to when a motion for dismissal for want of prosecution would be granted, the court in *United States v. McWilliams,* 163 F. 2d 695, 696 (D.C. Cir. 1947), stated:

> "Usually the Court will permit the prosecution to decide whether he will bring a case to trial. But where it appears, as here, there is serious doubt as to the success of the case and that the defendants because of the long delays granted over their objections, cannot obtain a fair trial, the court should exercise its discretion to deny prosecution."

There, of course, could not be serious doubts as to the success of the instant case where the defendant, and his counsel, after having examined the entire case file of the Government [R. T. 7] and having been made fully aware of the case against him, still refused to change his plea of guilty, even though the Court had indicated such a plea might be improvident. Naturally the defendant and his counsel, being aware of the true facts and the ability of the Government to prove such facts, were in a far better position to evaluate the case than the Court which had the benefit of only a superficial description of such facts offered in lieu of a probation report at the immediate sentencing requested by the defendant following his plea of guilty.

Clearly the Court's exercise of its discretion in rejecting the plea of guilty was proper. When, however, that act is followed by arbitrary and unreasonable rulings denying the Government a short continuance and dismissing the case, a remedy is required.

When the examination of the time elements in question, particularly the period of short duration between the rejection of the plea of guilty and the trial date the following morning is considered with certain comments of the Court, there is strong indication that the dismissal was not in reality based on any failure of prosecution, but on unstated, but clearly implied grounds.

In forcing the Government into an impossible position, namely, a trial without witnesses, the Court stated:

> "I don't like to put the Government in that position. But probably that is a very just position to put the Government . . . In this particular

> case, because of facts I shouldn't know which came out on the discussion of the sentence." [R. T. 16-17].

What "facts" that the Court "shouldn't know" were referred to in the above statement. Seemingly the only "facts" could have been whatever the Court derived from both the defendant's and Government counsel's comments on the circumstances of the offense, the same "facts" which might possibly have indicated to the Court that there existed a possibility of acquittal if the case were sent to a jury [R. T. 14].

The above comments of the Court when expanded to their logical conclusion seemingly indicate that if the trial Court feels prior to the introduction of evidence that the defendant *might* be acquitted, the Government may be prevented from bringing the case to trial. Such a denial of an opportunity to obtain witnesses has as its direct effect a prevention of prosecution on a proper indictment.

Any doubts that the denial of a continuance and the order of dismissal were based not on any delay, but on the Court's opinion concerning the quantum of evidence against the defendant; must also collide with the Court's comments on the morning of April 16, 1963, when the Court stated that since it knew "something about the Government's case", the motion for dismissal would be granted [R. T. 18-19].

Under these circumstances such a ruling could only be an expression of either sympathy for the defendant—or lack of sympathy for Dyer Act prosecutions, neither of which reasons can constitute a basis for dismissal under Rule 48(b). If the court felt there was

a possibility of acquittal, it could, in the proper exercise of discretion, have rejected the guilty plea *and* allowed the Government time to obtain witnesses. By any reasonable view when the court rejected the plea and dismissed the indictment for "want of prosecution" it violated its discretion in a grossly arbitrary manner.

If the situation had been different and there had been strong indications that the Government would not be able to present a case even if given a short continuance, the order of dismissal might be within the bounds of discretion. Where, however, the defendant (through his qualified counsel), has had the opportunity to examine all the evidence against him and persists in a plea of guilty, the court could not possibly have grounds to conclude that there was anything more than a bare chance of acquittal if the case went to trial. In this situation the dismissal cannot be supported.

The Court's ruling, while entitled a dismissal for want of prosecution would appear in reality to be the granting of a motion for judgment of acquittal since it was not based on any delay but on the quantum of evidence against the defendant. The novel feature about such a judgment of acquittal is that it is granted before any evidence is taken and before, in fact, there is any trial. If a standard for the ruling on such a motion may be gleaned from the record it would appear to be the following. When such a novel motion for acquittal is made prior to trial any unsworn statements of a defendant made in mitigation of punishment which indicate the possible existence of a defense is to be given face value without even benefit of cross-examination, the time honored method of testing truth.

On the other hand, any evidence that the Government *would have been able to present if it were allowed to try its case,* will be viewed in a light most unfavorable. That such a standard conflicts with the view of the Supreme Court and the Ninth Circuit as expressed in *Glasser v. United States,* 315 U. S. 60 (1942), is rather clear.

If such an erroneous standard is to be struck down and the Government to be allowed its day in Court, a remedy must be granted.

B. This Violation of Discretion Is of Such an Exceptional, Arbitrary, and Unreasonable Nature That a Writ of Mandamus Is an Appropriate Corrective Measure in the Event Appeal of Such a Question Is Not Available to the Government.

The Government is proceeding in the alternative—by appeal and petition. Cognizant of this Honorable Court's decision in *United States v. Apex Distributing Company,* 270 F. 2d 747 (9th Cir. 1959), the Government's position is that if the Court determines that it does not have jurisdiction to hear the appeal because of the limitations of Section 3731 of Title 18, U. S. C., then a Writ of Mandamus should issue against the Honorable William C. Mathes, directing him to vacate his judgment of April 16, 1963, to reinstate the indictment and to set a date for trial.

Ex parte United States, 287 U. S. 241 (1932);
In re United States, 286 F. 2d 556 (1 Cir. 1961);
United States v. Lane, 284 F. 2d 935 (9 Cir. 1960); and
United States v. United States District Court, 238 F. 2d 713 (4 Cir. 1956), cert. den. 77 S. Ct. 382,

all hold that in a proper criminal case a writ of mandamus may issue to correct error.

As the Supreme Court pointed out in *Virginia v. Reves,* 100 U. S. 313, 323 (1879), a writ of mandamus may be issued where there has been an abuse of discretion. Merely because an unreasonable and arbitrary act is cloak under exercise of discretionary powers does not mean that a writ is not an appropriate remedy. In *United States v. United States District Court, supra,* a writ of mandamus was issued where a trial court abused its discretion in refusing to allow *subpoenas duces tecum.* These subpoenas were requested in order to bring before the grand jury certain business records requested in the course of an investigation to determine whether indictments for violation of antitrust laws should be returned. This writ was issued despite the fact that the trial court was supposedly acting in a discretionary area utilizing its supervisory powers over the grand jury.

Where the effect of a trial court's action is to arbitrarily deprive the Government of its day in court, a writ of mandamus is an appropriate remedy, as the Supreme Court indicated in *Ex parte United States, supra.* While the situation in that case differed from the instant cast in that it concerned the refusal to issue a bench warrant on an indictment, the trial judge's action in the instant case had an equal impact on the Government's right of prosecution on a properly returned indictment. Since the effect of the action is basically the same,

the factors which led the Supreme Court to issue a writ in the aforementioned case indicate the appropriateness of the remedy in the present situation.

If trial courts are to exercise their powers under Rule 48(b) of the Federal Rules of Criminal Procedure not only to dismiss cases where there has been a failure of prosecution, but also to dismiss any cases which do not meet their subjective standards as to the type of case the Government should prosecute, the indictment process is reduced to a farce.

The problem that is here presented to the Honorable Court cannot be considered as a mere error in the exercise of discretion. This dismissal which prevented the Government from exercising its right to prosecute on the basis of a proper indictment is an instance of a flagrant infringement on the separate powers delegated to the executive branch of the Government. The judgment in this case directly clashes with the long recognition by the courts of the discretionary powers vested in the executive to determine what cases shall be prosecuted—powers which courts have stated are not to be interfered with by the judiciary. *Pugach v. Klein,* 193 F. Supp. 630, 635 (D. C. E. D. Penn., 1961).

It is submitted that the instant case discloses a gross violation of the separation of powers coupled with an arbitrary and unreasonable abuse of discretion. Accordingly, the superior and supervisory powers of this Honorable Court are respectfully petitioned.

VIII.

CONCLUSION.

The order of the District Court dismissing the indictment should be reversed or, in the alternative the United States requests this Court to issue a writ vacating the judgment of the Honorable William C. Mathes, dated April 16, 1963, dismissing the above mentioned indictment and ordering him to reinstate the indictment and set a date for trial.

Respectfully submitted,

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Certificate.

I certify that in connection with the preparation of this Brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing Brief is in full compliance with those rules.

ROBERT L. BROSIO,
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